

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
PETITION

FORM EXEMPT UNDER 44 U.S.C.

DO NOT WRITE IN THIS SPACE

Case No.

3-RC-11896

Date Filed

03/12/09

INSTRUCTIONS: Submit an original of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

The Petitioner alleges that the following circumstances exist and requests that the NLRB proceed under its proper authority pursuant to Section 9 of the NLRA.

1. PURPOSE OF THIS PETITION (If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.) (Check One)
- ☒ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ **RD-DECERTIFICATION (REMOVAL OF REPRESENTATIVE)** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY (REMOVAL OF OBLIGATION TO PAY DUES)** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ **UC-UNIT CLARIFICATION** - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: (Check one) ☐ In unit not previously certified. ☐ In unit previously certified in Case No. _____
- ☐ **AC-AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. _____. Attach statement describing the specific amendment sought.

2. Name of Employer M.B. Consultants		Employer Representative to contact Murray Bresky	Tel. No. 845-436-5051
3. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code) 5190 Main Street, South Fallsburg, New York 12779			Fax No. 845-436-5001
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Manufacturer	4b. Identify principal product or service Chicken		Cell No. e-Mail
5. Unit Involved (In UC petition, describe present bargaining unit and attach description of proposed clarification.) Included SEE ATTACHED Excluded Office clericals, professional employees, guards and supervisors as defined in the National Labor Relations Act.			6a. Number of Employees in Unit: Present 250 Proposed (By UC/AC) 6b. Is this petition supported by 30% or more of the employees in the unit? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No *Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

- 7a. ☐ Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about (Date) _____ (If no reply received, so state).
- 7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.
8. Name of Recognized or Certified Bargaining Agent (If none, so state.)
Local 726, I.U.J.A.T.
- Affiliation _____
- Address
1 Union Square West, New York, New York 10003
- Tel. No. _____
Cell No. _____
- Date of Recognition or Certification _____
Fax No. _____
e-Mail _____
9. Expiration Date of Current Contract. If any (Month, Day, Year)
December 19, 2009
10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop (Month, Day and Year)
- 11a. Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes ☐ No ☒
- 11b. If so, approximately how many employees are participating?
- 11c. The Employer has been picketed by or on behalf of (Insert Name) _____, a labor organization, of (Insert Address) _____ Since (Month, Day, Year) _____
12. Organizations or individuals other than Petitioner (and other than those named in items 8 and 11c), which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. (If none, so state)

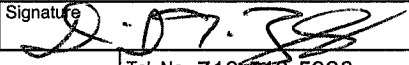
Name	Address	Tel. No.	Fax No.
		Cell No.	e-Mail

13. Full name of party filing petition (If labor organization, give full name, including local name and number)
United Food and Commercial Workers Union Local 342

14a. Address (street and number, city, state, and ZIP code) c/o Ira D. Wincott, Esq., 166 East Jericho Turnpike, Mineola, New York 11501 Mineola, New York 11501	14b. Tel. No. EXT 516-747-5980 689	14c. Fax No. 516-747-7961
	14d. Cell No.	14e. e-Mail iwincott@ufcw342.org

15. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (to be filled in when petition is filed by a labor organization)
United Food and Commercial Workers Union International

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print) David Young	Signature 	Title (if any) Director of Organizing
Address (street and number, city, state, and ZIP code) 8751 18th Avenue, Brooklyn, New York 11214	Tel. No. 718-513-5320 Cell No.	Fax No. 718-513-5419 eMail dyoung@ufcw342.org

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Addendum to Item #5

Included:

All full-time and regular part-time production and maintenance employees, including but not limited to live department employees, slaughterers, evisceration department employees, cryovac department employees, sanitation department employees, maintenance department employees, and mechanics, live drivers and dressed drivers employed by the Employer and its Main Street, South Fallsburg, New York Facility

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION

M.B. CONSULTANTS, LTD.
Employer

and

CASE 3-RC-11896

UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 342
Petitioner

and

LOCAL 726, I.U.J.A.T.

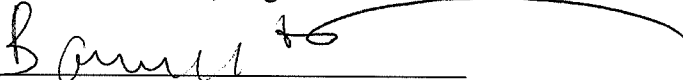
ORDER RESCHEDULING HEARING

A Hearing in the above entitled matter having been scheduled to commence on March 23, 2009, as the Employer and Union have requested that the hearing be rescheduled; upon due consideration and for good cause shown,

IT IS HEREBY ORDERED that the hearing in the above entitled matter be, and it hereby is, rescheduled for 10:00 a.m. on Thursday, March 26, 2009, and consecutive days thereafter, at the Leo W. O'Brien Federal Building, Room 342, Clinton Avenue and North Pearl Street, Albany, NY 12207.

DATED at Albany, New York this 17th day of March 2009.

RHONDA P. LEY, Regional Director



Barnett Horowitz, Resident Officer
National Labor Relations Board – Region Three
Leo W. O'Brien Federal Building-Room 342
Clinton Avenue and North Pearl Street
Albany, New York 12207

LITTLER MENDELSON, PC
One Newark Center, 8th Floor
Newark, New Jersey 07102
973.848.4700
Attorneys for M.B. Consultants, Ltd.

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I. STATEMENT OF PROCEDURE

On March 12, 2009,¹ the United Food and Commercial Workers Union, Local 342, (“UFCW”) filed a representation petition (Case 3-RC-11896) with Region 3 of the National Labor Relations Board seeking to represent the production and maintenance employees employed by Murray Bresky Consultants, Ltd. (“M.B. Consultants” or “Employer”) at its South Fallsburg, NY facility (hereinafter referred to as “Petition”) (Bd.Ex. 1).² The petitioned-for bargaining unit has been represented by Local 726, International Union of Journeymen & Allied Trades (“Local 726”) for the past 10+ years. On March 26, a hearing was held before Hearing Officer Kelly Moore-LaMotta at Region 3’s office in Albany, New York. The sole issue set for hearing by the Regional Director is whether the extant collective bargaining agreement between Local 726 and M.B. Consultants is an effective contract bar which precludes the further processing of the Petition. The parties were granted until the close of business on Thursday, April 2, to submit post-hearing briefs.

II. STATEMENT OF THE CASE

The instant Petition is the UFCW’s attempt to interfere with a 10+ year bargaining relationship between Local 726 and M.B. Consultants. Over the course of that 10+ year span, Local 726 and M.B. Consultants have been parties to successive collective bargaining agreements, which has provided labor stability to the approximate workforce of 300 employees.

The extant collective bargaining agreement is effective from February 27, 2009 through February 26, 2012 (“2009-2012 CBA”). The 2009-2012 CBA satisfies all requirements under Board

¹ All dates hereinafter are 2009 unless otherwise noted.

² Board Exhibits are designated “(Bd.Ex.____)”; Petitioner UFCW’s Exhibits are designated “(Pt.Ex.____)”; and Incumbent Local 726’s Exhibits are designated “(U. Ex. ____); Transcript Citations are designated “(Tr.____)”.

law and the NLRB's Outline of Law & Procedure in Representation Cases to be deemed an effective contract bar. Without question, the 2009-2012 CBA contains substantial terms and conditions of employment that are sufficient to stabilize the collective bargaining relationship.

Plainly stated, there is no merit to the UFCW's anticipated arguments. First, the UFCW's claim that the 2009-2012 CBA does not contain substantial terms and conditions is factually and legally meritless. The 2009-2012 CBA contains the terms of the prior collective bargaining agreement effective December 20, 2004 (U.Ex. 1) plus newly negotiated terms and conditions of employment. Second, the UFCW's contention that the Region should apply the "premature extension" doctrine to render the 2009-2012 CBA ineffective as a contract bar flies in the face of decades of Board precedent with no logical basis for so doing. The Petition was filed in the 5th year of the prior collective bargaining agreement and the "premature extension" doctrine is not applicable. Indeed, processing of the Petition to negate the 2009-2012 CBA would run counter to the NLRA principles of protecting industrial stability.

Processing the Petition would only serve to achieve the UFCW's goals of signing up more members while, at the same time, destroying a decade of labor stability enjoyed by the hard-working employees of M.B. Consultants. Clearly, the instant Petition is barred by the 2009-2012 CBA and should be dismissed without further delay.

III. STATEMENT OF FACTS

The material facts detailed below are uncontested in the record. The only witness to testify at the hearing was Local 726's Director of Organizing, Mark Reader ("Reader").

A. Background

M.B. Consultants operates a chicken processing plant in South Fallsburg, NY and employs approximately 300 employees at its facility. For at least the past 10 years, Local 726 has represented the bargaining unit of all full-time and regular part-time production and maintenance employees. Local 726 and M.B. Consultants have been parties to successive contracts spanning that duration.

The prior collective bargaining agreement between the parties was dated December 20, 2004 through December 19, 2009 ("2004-2009 CBA").³ The 2004-2009 CBA was negotiated by Reader. (Tr. 10). Ratification by the rank-and-file was not a condition precedent to the effectiveness of the 2004-2009 CBA. Indeed the only mention of ratification in the 2004-2009 CBA was a ratification bonus offered by the Employer as an incentive to get the membership to accept the final offer. (Tr. 33). The 2004-2009 CBA afforded employees stability in their terms and conditions of employment. During the contract term, the employees' benefits package was supplemented with a health care plan and AD&D benefits. (U.Ex. 1).

B. Negotiation of the 2009-2012 CBA

At a membership meeting on December 15, 2008, employees informed Local 726 that there were dramatic operational changes occurring at the Company, including layoffs. (Tr. 15). On January 27, 2009, Local 726 representative Henry Gange ("Gange") met with the Company's Vice President of Operations, Dean Koplik ("Koplik"). During this conversation, they discussed the

³ The UFCW does not contest the validity of the 2004-2009 CBA or the sufficiency of its terms as a effective contract to bar a timely filed petition.

Company's proposed plan to pay employees for productivity and, as a result, Gange requested bargaining over the entire collective bargaining agreement. (Tr. 19). On February 13, Reader, Gange, Shop Steward Carlos "Doe" and Local 726 Business Agent Alvin Salcedo met with Koplik to discuss replacing the costly Aetna medical plan with the United Benefit Funds medical plan. Koplik also informed Local 726 that the Company intended to implement productivity changes, reduce staff and give raises to select departments. In response, Local 726 demanded bargaining for a new contract which would contain these changes. (Tr. 21). On February 24, Local 726 met with its shop stewards to discuss the productivity plan and the better medical coverage available through the United Benefit Funds. (Tr. 21-22). On February 26, Local 726 had a membership meeting with over 100 employees to discuss these same issues. (Tr. 40-41).

On February 27, Local 726 presented the Company with a contract proposal. (Tr. 22). The parties negotiated throughout the day over the terms. (Tr. 22-24, 47). Eventually, the parties reached an agreement and a Memorandum of Agreement was finalized by their respective counsel. (Tr. 47). The Memorandum of Agreement was executed on February 27, 2009 ("MOA") (U.Ex. 2).⁴ Just like the 2004-2009 CBA, ratification by the rank-and-file was not a condition precedent to the effectiveness of the 2009-2012 CBA. (Tr. 32, 1.9-12). The 2009-2012 CBA, as memorialized by the MOA, contains all provisions of the 2004-2009 CBA plus:

- The Company's agreement not to layoff employees for six months
- The Company's agreement not to sell or transfer the business for six months
- Wage increases on a department basis pegged to productivity

⁴ Although not relevant to the instant issue of whether a contract bar existed at the time the Petition was filed, the record makes clear that Local 726 met with the bargaining unit to explain the terms of the 2009-2012 CBA a few days after its execution.

- Participation in the United Benefit Funds welfare plan (which made health coverage more affordable for employees) (See details in U.Ex. 3, Tr. 37)
- Increased life insurance to \$20,000
- Added eye glass plan, dental plan and a generic drug plan at zero cost
- Economic re-opener if Local 726 fails to reach an agreement on wage increases for the entire plant within six months
- Interest arbitration if an agreement is not reached by the parties regarding wages and benefits
- The Company's agreement to notify Local 726 of a plant closing and negotiate a severance pay plan subject to arbitration (Tr. 36)

(U.Ex. 2; Tr. 22-23).

C. The UFCW Files The Petition

Two weeks after the 2009-2012 CBA is negotiated and executed by the parties, the UFCW filed the instant Petition.⁵

⁵ The record contains an offer of proof that the UFCW held an organizational meeting with employees of M.B. Consultants on February 14. The Employer and Local 726 also made offers of proof that they were not aware of such organizational meeting. (Tr. 84-86). Regardless, these offers of proof have no legal significance under Board precedent in resolving the issue of whether the 2009-2012 CBA is a contract bar to the further processing of the Petition.

IV. ARGUMENT

The 2009-2012 CBA is an effective contract bar to the further processing of the Petition. To hold otherwise would disregard decades of established Board precedent and the uncontested record evidence.

A. The 2009-2012 CBA Is An Effective Contract Bar To The Processing Of The Petition

Under Appalachian Shale Products Co., 121 NLRB 1160 (1958) and 50 years of precedent, the Board considers multiple factors in analyzing whether a contract is a bar to a petition. As detailed in Chapter 9 of the NLRB's Outline of Law and Procedure in Representation Cases, the factors include: (1) The contract must be reduced to writing; (2) The contract must be signed by all the parties before the rival petition is filed; (3) The contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; (4) The contract must clearly by its terms encompass the employees involved in the petition; (5) The contract must cover an appropriate unit; (6) A contract for "members only" does not operate as a bar; (7) A master agreement covering more than one plant or a multiemployer group is no bar to an election at one of the plants where by its terms it is not effective until a local agreement has been completed, or until the inclusion of the plant has been negotiated by the parties as required by the master agreement, and a petition is filed before these events occur; and (8) When ratification is a condition precedent to contractual validity by express contractual provision, the contract is ineffectual as a bar unless it is ratified prior to the filing of a petition.

Factors 1, 2, 4 and 5 are indisputably satisfied by the 2009-2012 CBA. Factor 1 – the MOA was signed by Reader and M.B. Consultant's owner Murray Bresky. Factor 2 – the MOA was executed two weeks before the Petition was filed. Factor 4 – the 2009-2012 CBA encompasses the

same exact bargaining unit as in the Petition. Factor 5 – the 2009-2012 CBA covers the same production and maintenance unit that has been unionized and covered by a collective bargaining agreement for at least 10 years. Indeed, the UFCW does not challenge the appropriateness of the existing bargaining unit and, in fact, seeks to represent the same exact unit in its Petition.⁶

The UFCW's anticipated challenges to Factors 3 and 8 are baseless, as detailed below.

1. Substantial Terms and Conditions of Employment – Factor 3

The UFCW's anticipated argument that the 2009-2012 CBA does not contain "substantial terms and conditions of employment deemed sufficient to stabilize the bargaining unit" is farcical. The MOA retains all of the major provisions of the 2004-2009 CBA which have governed the terms and conditions of employment for the 300 employee bargaining unit over the past five years. See Jackson Terrace Associates, 346 NLRB No. 18, n.3 (2005) (in finding a contract bar, the Board noted that the agreement at issue specifically retained the terms of the parties' prior collective bargaining agreement which provides the "requisite degree of labor relations stability to constitute a bar"). What's more, the MOA provides additional terms and conditions to even further stabilize the bargaining unit. For one, the 2009-2012 CBA protects the employees from layoffs or loss of jobs over the next six months. (See Pars. 3 and 4 of U.Ex. 2). This is very substantial in light of the Company's layoffs in early 2009 and the consolidation in the industry during these challenging economic times. (Tr. 35). Moreover, the 2009-2010 CBA provides for wage increases, improved health insurance, \$20,000 life insurance, dental coverage, eye glass coverage and a zero-cost prescription plan. The 2009-2012 CBA goes even further towards providing stability by compelling the parties to proceed to binding interest arbitration if there is a disagreement over the new wages

⁶ Factors 6 and 7 are not applicable to the instant matter.

and benefits terms.

Despite the obvious facial sufficiency of the 2009-2012 CBA, the UFCW will likely argue that the wage increases are not detailed, thus, there is no contract bar. Similar arguments have been heard and rejected by the Board for decades. “The Board does not require that an agreement delineate completely every single one of its provisions in order to qualify as a bar.” U.S.M. Corp., 256 NLRB 996 (1981). Thus, an agreement that contains substantial terms and conditions of employment may constitute a bar even though it arguably does not specify rates of pay. Cooper Tank & Welding Corp., 328 NLRB 759 (1999). In Cooper Tank & Welding Corp., the Board rejected the Acting Regional Director’s finding that a contract’s failure to set forth specific wage rates is fatal to the contract’s operating as a bar. The Board found that:

We do not agree with the Acting Regional Director’s finding that the contract’s failure to set forth specific wage rates is fatal to the contract’s being a bar. First, we note that in all other respects the contract is complete. It includes provisions pertaining to, inter alia, union security, general conditions, picket lines, hours of work, Saturday and Sunday work, shop stewards and union visitation, seniority, grievance and arbitration procedures, holidays, vacations, better working conditions, discrimination against union members, work condition standards, discharges, strikes and lockouts, leave of absence, and health and welfare. That a contract of this dimension does not include a specific wage provision as such is, in this context, insufficient to render it null for bar purposes. Stur-Dee Health Products, 248 NLRB 1100 (1980); Spartan Aircraft Co., 98 NLRB 73 (1952).

Id. at 760. The Board concluded that “considering the otherwise extensiveness of the contract, we are unwilling to find that the absence of a definitive wage provision removes the contract as a bar.”

Id. See also Stur-Dee Health Products, supra (the failure of an agreement to delineate every possible provision does not negate the bar quality of the agreement); The Youngstown Osteopathic Hospital Association, 216 NLRB No. 136 (1975) (the absence of specific wage rates in a current agreement renegotiated by the parties did not render it deficient for contract-bar purposes); Spartan Aircraft Co., supra at 74-75 (1952) (the Board found an otherwise detailed contract which contained a provision

stating that the employer and the union would “endeavor to agree upon the proper classification and hourly rate ranges as soon as possible” sufficiently complete to constitute a contract bar). In sum, Factor 3 is satisfied.

Based on the above, the 2009-2012 CBA is an effective bar even though it does not contain specific wage increases. In further support of this conclusion, the MOA provides for binding interest arbitration if the parties do not agree to wage increases for all departments. Board precedent is clear that the parties’ decision to leave economic items, such as wages and benefits issues, to interest arbitration, is sufficient for the agreement to operate as a bar. Stur-Dee Health Products, at 1101.

2. Ratification By The Rank-And-File – Factor 8

In grasping at straws, the UFCW will likely argue that the 2009-2012 CBA was not ratified, hence, it cannot act as a contract bar to the Petition. Once again, there is no basis to this claim.

Only where the express terms of the contract condition its validity upon ratification will the contract be ineffectual as a bar if it is not ratified prior to the filing of a petition. Appalachian Shale Products Co., supra. “That principle means that a condition of prior ratification cannot be established by parol or other extrinsic evidence.” Merico, Inc., 207 NLRB 101 n.2 (1973). Simply put, if the contract does not state that ratification is required, the contract is effective upon execution without ratification.

Here, the express terms of the MOA do not require ratification as a condition precedent to its effectiveness. Therefore, the UFCW’s position must be rejected outright. To the extent the UFCW argues that contract ratification is required “because it was required in the 2004-2009 CBA,” this is ludicrous. Parol evidence is not considered by the Board in contract bar cases. What happened in the 2004-2009 CBA should not have any bearing (although it confirms that ratification is not required by the parties herein) on the Region’s analysis. Notwithstanding, ratification was not

required for effectiveness of the 2004-2009 CBA. Indeed, the only reference to “ratification” in the 2004-2009 CBA was the “ratification bonus” paid to employees to get them to accept the Employer’s final offer. Moreover, the issue of ratification is an internal union matter and Local 726’s Constitution does not require contract ratification. (U.Ex. 4). In short, ratification was not required by the parties and the 2009-2012 CBA is effective. Therefore, Factor 8 is satisfied.

B. The Effectiveness Of The 2009-2012 CBA As A Contract Bar Is Not Negated By The Premature Extension Doctrine

The UFCW may contend that the Board should apply the “premature extension” doctrine to negate the effectiveness of the 2009-2012 CBA as a contract bar. This argument manifests a disregard for Board precedent and an attempted perversion of the intent behind the premature extension doctrine.

A rival petition is timely filed only if it is submitted during the 30-day open period between the 90th and 60th day prior to the existing contract’s termination date. A contract is effective as a bar to a petition for a maximum of three years, even if the contract is for a longer duration. General Cable Corp., 139 NLRB 1123, 1125 (1962). The parties cannot execute an amendment or new contract containing a later termination date in order to “close” the open period and preclude the filing of a rival petition during the 30-day open period. Thus, during the first three years of a contract, if the parties enter into an amendment or a new contract containing a later termination date, the contract is deemed prematurely extended and it will not bar a rival petition. Deluxe Metal Furniture Co., 121 NLRB 995, 1001-1002 (1958); Shen-Valley Meat Packers, 261 NLRB 958 (1982). The premature extension rule is applicable only if, at the time of the extension of an existing agreement, the existing agreement would bar an election petition (i.e., maximum three year duration). If at the time of the extension, the existing agreement would not bar an election petition (for example, if a

contract of five years' duration is extended during its fourth year), the premature extension rule is not applicable and the extended agreement will bar an election in accordance with normal contract bar rules. Cushman's Sons, Inc., 88 NLRB 121 (1950). Thus, "the doctrine's dual rationale is to permit the employer, the employees' chosen collective bargaining representative, and the employees a reasonable, uninterrupted period of collective bargaining stability, while also permitting the employees, at reasonable times, to change their bargaining representative, if that is their desire." Direct Press Modern Litho, Inc., 328 NLRB 860 (1999).

Herein, the open period under the 2004-2009 CBA was from September 20, 2007 to October 20, 2007. Obviously, the UFCW did not file its Petition during that open period. Once the third year anniversary of the 2004-2009 CBA passed on December 20, 2007, the premature extension rule was not longer applicable. The rationale behind the premature extension doctrine is not applicable here as the UFCW had 14 months from December 20, 2007 to February 27, 2009 to file a petition, but it failed to do so. Accordingly, the premature extension rule is not applicable herein.

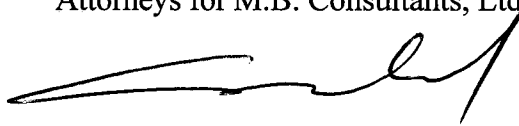
Once the parties executed the MOA on February 27, 2009, there was an effective contract bar in place. There is no legal precedent for the Region to process the instant Petition and undermine the labor stability fostered by the 2009-2012 CBA and Local 726's decade-long representation. Labor stability is fostered and employee freedom of choice is protected by deeming the 2009-2012 CBA an effective contract bar.

V. **CONCLUSION**

It is respectfully requested that the Region dismiss the Petition on the basis that the 2009-2012 CBA is an effective contract bar.

Respectfully submitted,

LITTLER MENDELSON, PC
One Newark Center, 8th Floor
Newark, New Jersey 07102
Attorneys for M.B. Consultants, Ltd.

A handwritten signature in black ink, appearing to read 'Alan I. Model', is written over a horizontal line.

Alan I. Model

Dated: April 2, 2009

CERTIFICATE OF SERVICE

I, Alan I. Model, hereby certify that the Post-Hearing Brief on Behalf of M.B. Consultants, Ltd. in Case No. 3-RC-11896, has been served this day FedEx and via electronic filing upon:

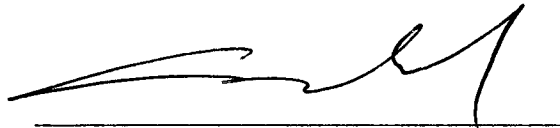
Rhonda P. Ley, Regional Director
National Labor Relations Board, Region 3
130 South Elmwood Avenue, Suite 630
Buffalo, NY 14202-2465

and via fax and FedEx upon the Petitioner:

Ira Wincott, Esq.
UFCW Local 342
166 East Jericho Turnpike
Mineola, NY 11501

and via fax and FedEx upon the Union:

Richard Greenspan, Esq.
Law Office of Richard M. Greenspan, PC
220 Heatherdell Road
Ardsley, NY 10502

A handwritten signature in black ink, appearing to read 'Alan I. Model', is written over a horizontal line.

Alan I. Model

Dated: April 2, 2009

Firmwide:89238527.1 051648.1000

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

MURRAY BRESKY CONSULTANTS, LTD.

Employer

and

Case 3-RC-11896

**UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 342**

Petitioner

and

**LOCAL 726, INTERNATIONAL
UNION OF JOURNEYMEN &
ALLIED TRADES**

Union

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that Murray Bresky Consultants, Ltd., hereinafter referred to as the Employer, is a corporation with a principal place of business located in South Fallsburg,

New York, where it is engaged in the operation of a poultry processing plant. During the past 12 months, a representative period, the Employer, in conducting its business operations, received at its South Fallsburg, New York facility, goods, materials, and/or supplies valued in excess of \$50,000 directly from points located outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that United Food and Commercial Workers, Local 342, hereinafter referred to as the Petitioner, is a labor organization within the meaning of Section 2(5) of the Act.

4. The parties stipulated, and I find, that Local 726, International Union of Journeymen and Allied Trades, hereinafter referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act. The Union claims to represent certain employees of the Employer.

5. A question affecting commerce has arisen herein concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Petitioner seeks an election in a bargaining unit comprised of all employees in the classifications of work covered by the 2004-2009 collective-bargaining agreement as described herein. At the hearing, the parties stipulated that the petitioned-for bargaining unit is an appropriate bargaining unit.

At issue is whether the Memorandum of Agreement (MOA) between the Employer and the Union, currently in effect from February 27, 2009 through February 26, 2012, is a contract that bars an election in the petitioned-for unit. The Petitioner argues that the MOA is not a valid

contract bar. The Petitioner further argues that the most recent collective-bargaining agreement, dated December 20, 2004 through December 19, 2009, is not a bar because the instant petition was filed in the fifth year of the contract, after the three-year contract bar period expired. The Employer and the Union contend that the MOA constitutes a contract bar and precludes the processing of the petition for election.

Based on the evidence adduced at the hearing and the relevant case law, I conclude that the MOA constitutes a new agreement between the parties and is a bar to the petition for election filed herein.

FACTS

The Employer operates a poultry processing plant in South Fallsburg, New York. Murray Bresky is the Employer's president, and Dean Koplik is the vice-president of operations. For approximately 10 years, the Union has been the collective-bargaining representative of the employees in the following appropriate unit, as set forth in the most recent collective-bargaining agreement between the parties, which by its terms was effective from December 20, 2004 through December 19, 2009:

All full-time and regular part-time production and maintenance employees, including but not limited to live department employees; slaughterers; evisceration department employees; cryovac department employees; sanitation department employees; maintenance department employees; and mechanics; live drivers and dressed drivers employed by the Employer at its Main Street, South Fallsburg, New York facility, excluding office clericals; professional employees; guards and supervisors as defined in the Act.

On February 27, 2009, in the fifth year of the contract, the Employer and the Union entered into a MOA. On March 12, 2009, the Petitioner filed a petition for an election in the unit currently represented by the Union.

Mark Reader, the Director of Organizing for the Union, was the sole witness in this proceeding.¹ Reader negotiated the 2004 collective-bargaining agreement, and directed business agent Alvin Salcedo and international representative Henry Cange to sign the agreement on behalf of the Union. On January 17, 2006, the parties agreed to an addendum to the 2004 collective-bargaining agreement, modifying the agreement to include a provision for the employees to receive an accidental death and dismemberment benefit at the Employer's expense. The addendum was signed by Cange on behalf of the Union, and by Koplik on behalf of the Employer.

The record demonstrates that the Union held a meeting with employees on December 15, 2008. At this meeting, employees raised concerns about layoffs, an increased workload for the remaining employees, added pressure, and harassment from supervisors. After this meeting, Cange approached the Employer with the employees' concerns, and asked for a "partnering."² Koplik told Cange that the Employer anticipated hiring a new operations manager in January, and overhauling the entire operation.

Cange subsequently met with Koplik and Larry Earle, the new operations manager, on January 27, 2009. During this meeting, Koplik advised Cange that the Employer wanted to implement pay increases based on impending efficiency studies. Cange objected to the pay increases, and requested to negotiate an entire contract. The Employer's position was that it was going to implement the pay increases when the efficiency studies were completed.

¹The Petitioner made an offer of proof at the conclusion of the hearing that it had held an organizing meeting with unit employees on February 14, 2009, and the Employer and the Union made corresponding offers of proof that they were unaware of Petitioner's organizing effort. While it is unclear from the record whether these offers of proof were made as a result of the hearing officer's ruling that the proffered testimony is not admissible, I find, in agreement with the Union and the Employer, that the evidence regarding the Petitioner's February 14, 2009 meeting with employees is not relevant in the instant proceeding. Even assuming that the Petitioner had presented the testimonial evidence contained in the offer of proof, such evidence would not change my ruling herein.

² The record does not disclose what Cange meant by the term "partnering."

On February 13, 2009, Union representatives Reader, Cange, Salcedo, and steward Carlos (last name unknown) met with the Employer in Koplik's office.³ Salcedo attended this meeting because he is associated with the United Benefit Fund, and the Union wanted to raise with the Employer an alternative medical plan for employees.⁴ According to Reader, the parties engaged in a detailed discussion about bargaining at this meeting. The Employer's position was that Operations Manager Earle was going to start implementing productivity changes, which included pay increases and staff reductions. Specifically, Earle intended to implement a pay increase for 18 employees on one production line; and raises were being prepared for employees on two other production lines, based on the efficiency studies already completed.

According to Reader, the Union advised the Employer that it intended to file unfair labor practice charges if the Employer implemented the changes. Specifically, the Union was concerned that some departments would not receive pay increases, and about inconsistencies in the timing and amounts of the pay increases. The Union insisted that the parties engage in formal negotiations and formalize proposals in a new collective-bargaining agreement.⁵ While it is unclear from the record whether the parties agreed to negotiations at the meeting, Reader testified that the Union convinced the Employer to engage in bargaining.

The record demonstrates that representatives of the Union met with stewards Carlos, Backary and Pops on February 24, 2009.⁶ At this meeting, the Union explained the Employer's proposed productivity program, and also discussed a new medical plan that would provide better insurance coverage to the members. After the February 24 meeting, the Union then met with approximately 100 employees in the Employer's cafeteria on February 26, 2009, to discuss

³ The record does not disclose who was present for the Employer at this meeting.

⁴ Only 42 of the approximately 300 bargaining unit employees participated in the medical plan in effect at the time of the hearing, which has a \$1000 deductible including prescription drugs, and no dental benefits.

⁵ The record does not disclose who spoke on behalf of the Union at this meeting.

⁶ The fourth steward, Lupe, was not at this meeting because she works the night shift.

bargaining proposals.⁷ At this meeting, the Union addressed employee concerns about medical benefits, and the Union advised employees about the proposed pay increases, including the departments that had received increases and the departments that were scheduled to receive increases. The Union explained that other departments would receive pay increases based on the results of the efficiency studies the Employer was conducting.

Director of Organizing Reader testified that after the February 26 meeting with employees, the Union prepared a contract proposal, and met with the Employer for negotiations on February 27, 2009. According to Reader, the Union's proposals included a medical plan through the United Benefit Fund program and an opt-out bonus for employees who chose not to participate; a six-month window for the Employer to complete the efficiency studies; provisions regarding layoffs and plant closing; a severance package; and economic re-opener and arbitration provisions in the event that the parties did not agree on wage increases for the entire plant. After exchanging several draft agreements throughout the day, the parties, by Murray Bresky for the Employer, and Reader and stewards Carlos and Backary (last name unknown) for the Union, signed the MOA on February 27, 2009, set forth below:

Memorandum of Agreement

Whereas, M.B. Consultants ("Employer") and Local 726, IUJAT ("Union") are parties to a collective bargaining agreement effective December 20, 2004 through December 19, 2009; and

Whereas, the Union and the Employer have met and bargained in good faith over the terms of a new collective bargaining agreement effective February 27, 2009 – February 26, 2012,

NOW THEREFORE, IT IS AGREED:

1. All provisions of the collective-bargaining agreement between the parties effective December 20, 2004 – December 19, 2009 will remain in effect unless modified herein.

⁷ The record does not disclose who from the Union was present at this meeting.

2. The new agreement is effective for a three year period from February 27, 2009 – February 26, 2012 (“Agreement”).

3. The Employer will not layoff any employees during the next six months. The only reduction in the workforce will come by attrition over the next six months (i.e. if someone terminates employment the Employer has the right not to replace them).

4. The Employer will not sell or transfer the business for at least the next six (6) months while during this period of company reorganization.

5. Wage increases will be implemented on a department basis, after a review by management of the efficiency in each department. In the departments that have already received wage increases of over \$1.00 per hour in the past month, I further efficiencies can be found there will be more money available for raises during the term of the Agreement. The other departments will receive raises according to the efficiencies found after the Employer individually reviews departmental operations. The Employer will notify the Union of any proposed wage increases and give the opportunity for the Union to review the basis for the Employer’s decisions.

6. The Union will seek to arrange for Employer participation for medical coverage for employees thru the United Benefit Fund effective March 1, 2009 at the same contribution formula that presently exists for providing medical coverage. The Employer and the Union agree to add \$20,000 employee life insurance, a basic eye glass plan, a basic dental plan, and to provide a supplement to the NY State disability plan. The prescription drug program will have a zero co-pay cost for generic drugs. In the event there is a disagreement as to the benefits or the cost therefore, the dispute will be the subject of arbitration to be concluded under the grievance arbitration provisions of the Agreement.⁸

7. Between September 1, 2009 and October 31, 2009, either party may request in writing adjustments or changes in economic terms to be effective during the term of the Agreement. Neither party is obligated to make such requests. If a request is made,

⁸ The memorandum states that the benefit plan will become effective on March 1, 2009, but Reader testified that it will most likely be May 1, 2009. During the negotiations on February 27, 2009, the Employer requested that the Crystal Run Health Care Plan, a local clinic care plan, be included in the health network. According to Reader, the May 1, 2009 date will give the Union sufficient time to arrange to include the Crystal Run clinics in the health benefit plan and enroll the employees in the United Benefits Fund plan, and give the Employer the requisite time to terminate the old health plan.

failure to reach an Agreement between the parties on such adjustment or change will be subject to arbitration to be conducted under the grievance arbitration provisions of the Agreement. Notwithstanding this limited reopener, the Union agrees that the no-strike provisions will remain in effect until February 26, 2012.

8. If the Employer closes all or part of its operation during the term of this Agreement, it will as soon as practicable after the decision is made, notify the Union in writing and the parties will need to negotiate a severance pay plan. If the parties fail to reach an agreement, the terms of such severance pay plan will be subject to arbitration under the grievance arbitration provisions of the Agreement.

The parties hereto have caused this Agreement to be signed by their duly authorized representatives this 27th of February, 2009.

On March 2, 2009, the Union advised employees in the cafeteria at the Employer's facility that it had reached an agreement. On March 4, 2009, Union business agents visited the Employer's facility and met with employees in each department prior to the start of their shifts and explained the MOA to them.⁹

The 2004 collective-bargaining agreement included the following provision:¹⁰

All full-time employees who have completed their probationary period as of December 20, 2004 will receive a ratification bonus of \$100.00 in their paychecks immediately following ratification of this Agreement. All part-time employees who have completed their probationary period as of December 20, 2004 will receive a ratification bonus of \$50.00 in their paychecks immediately following ratification of this Agreement. All full-time employees hired before December 20, 2004 who have not completed their probationary period, will receive a ratification bonus of \$100.00 in their paychecks upon completion of their probationary period. All part-time employees hired before December 20, 2004 who have not completed their probationary period, will receive a ratification

⁹ The 2004 agreement contained a provision requiring that both Spanish and English versions of the collective-bargaining agreement be made available to employees. Accordingly, the business agents distributed Spanish and English versions of the MOA to employees on March 4, 2009.

¹⁰ According to Reader, the Union did not want to sign a five-year agreement. Accordingly, the Employer and the Union agreed to a ratification bonus for employees and, in exchange, the Union agreed to present the agreement to the membership with a neutral recommendation.

bonus of \$50.00 in their paychecks upon completion of their probationary period.

Finally, the 2004 collective-bargaining agreement contains an automatic renewal clause in Article 27, which provides as follows:

This Agreement shall go into full force and effect on December 20, 2004, and shall remain in full force and effect until December 19, 2009, and thereafter for successive one (1) year periods unless notice is given in writing either by the Union or the Employer to the other not less than sixty (60) days prior to the expiration date of this Agreement or any renewal hereof of its desire to modify, amend, or terminate this agreement.

The record demonstrates that no party demanded bargaining in writing prior to February 26, 2009.

ANALYSIS

In General Cable Corporation, 139 NLRB 1123 (1962), the Board set forth the three-year contract bar rule, stating therein that a collective-bargaining agreement will only serve as a bar to a rival union's representation petition for a period of three years. The Board has held that a contract with a fixed term of more than three years will operate as a bar for that portion of its term that does not exceed three years. A representation petition may be filed within the appropriate open period prior to the third-year anniversary date of the contract, or after the third-year anniversary date of any contract more than three years in duration. See M.C.P. Foods, 311 NLRB 1159 (1993).

The Board has consistently held that parties to a long-term collective-bargaining agreement can reactivate the contract bar after the initial term of "reasonable duration" has passed, but before a rival representation petition is filed, by executing "(1) a new agreement which embodies new terms and conditions, or incorporates by reference the terms and conditions of the long-term contract, or (2) a written amendment which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a

specific period . . .” Southwestern Portland Cement Company, 126 NLRB 931, 933 (1960). In order for a contract to serve as a bar, it “must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship.” Appalachian Shale Products Co., 121 NLRB 1160, 1163-1164 (1958). Where a new agreement meets the substantive contract bar standards set forth by the Board, that agreement shall be effective as a contract bar for as much of *its* term as does not exceed three years. [emphasis added] See General Cable Corporation, 139 NLRB at 1123.

The Petitioner contends that the MOA does not constitute a contract bar because: (1) the parties failed to properly comply with the notice requirements set forth in the 2004 collective-bargaining agreement and Section 8(d) of the Act to modify or terminate the existing agreement; (2) the MOA does not contain substantial terms and conditions of employment sufficient to stabilize the parties’ collective-bargaining relationship; and (3) the MOA was not ratified.

Contrary to the Petitioner, I find, based on the record herein and the extant case law, that the MOA is a bar to the processing of the petition. In so finding, I conclude that the MOA constitutes a new agreement between the parties which embodies new terms and conditions of employment, contains a specific duration clause, and expresses the intent of the parties to be bound by those terms and conditions of employment of the 2004 collective-bargaining agreement not modified by the new agreement.

Failure to Give Notice Under Section 8(d) of the Act and Article 27 of the Agreement

The Petitioner argues that, pursuant to Section 8(d) of the Act and Article 27 of the collective-bargaining agreement, the parties were required to give, in writing, 60-days’ notice of

any intention to modify or terminate the agreement.¹¹ The Petitioner further argues that the failure of either party to properly give notice as required by the Act and the collective-bargaining agreement means that the five-year collective-bargaining agreement is still in effect, and has not been terminated or modified by any subsequent agreements, including the MOA at issue in the instant case. Accordingly, Petitioner contends that the long-term contract is not a bar to the processing of the petition because its status as a contract bar for the three-year period has expired.

Petitioner argues in its post-hearing brief that, pursuant to Section 8(d) and Article 27 of the collective-bargaining agreement, the 2004 agreement could not be modified in the absence of written notice. Initially, I find Petitioner's reliance on Section 8(d) of the Act to be misplaced, as neither the plain language of the statute, nor extant Board law, supports Petitioner's argument. The purpose of Section 8(d) is to safeguard the collective-bargaining relationship where one or both parties does not intend to be bound by the terms of an agreement after that agreement expires. See, e.g., Carpenters District Council of Denver, 172 NLRB 793 (1968).¹² There is no prohibition embedded in the statute that prohibits parties from proposing amendments to

¹¹ Section 8(d) of the Act states, in relevant part: **[Obligation to bargain collectively]** For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising there under, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification.

¹²The Board in Carpenters District Council of Denver, 172 NLRB 793, 795 (1968) quoted the following from the legislative history of the Act: “We have provided in the revision of the collective-bargaining procedure in connection with the mediation process, that before the end of any contract whether it contains a provision or not, either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective bargaining, and then for the intervention of the Mediation Service. If such notice is given, the bill provides for no waiting period except during the life of the contract itself.” (Senator Taft, 93 Cong. Rec. 3839)

contracts that would become effective by mutual agreement. Communications Workers of America, AFL-CIO, 186 NLRB 625, 627 (1970).

I also do not agree with Petitioner's claim that Article 27 of the collective-bargaining agreement prohibits mid-term contract modifications in the absence of the written notice set forth in the contract. In so finding, I note that the language relied on by the Petitioner constitutes an "evergreen clause" with a standard notice requirement that is triggered by the impending expiration of the contract. Specifically, this language amounts to an automatic renewal clause in the absence of written notification by either party of a desire to modify or terminate the agreement. However, the failure to give notice, either under the terms of this clause or Section 8(d) of the Act is not fatal to negotiating a new contract. Rather, where, as here, both parties consent, an existing contract may be terminated or modified in the absence of such notices. See Resort Nursing Home, 340 NLRB 650 (2003). See also Industrial Workers AIW, Local 770, 285 NLRB 651, 654 (1987), quoting Anchorage Laundry and Dry Cleaning, 216 NLRB 114 (1975)(even where timely notice is not given, a party "by its action, could have waived the notice requirement and agreed to bargain.")

For the reasons cited herein, I find no merit to Petitioner's argument that the 2004 collective-bargaining agreement is still in effect because no party gave written notice of the intent to modify or terminate the agreement.

Adequacy of the Terms of the MOA

Petitioner next argues that the MOA is not a bar to an election because it does not contain substantial terms and conditions of employment sufficient to stabilize the collective-bargaining relationship, as set forth by the Board in Appalachian Shale Products Co., 121 NLRB 1160. In this regard, Petitioner relies on Madelaine Chocolate Novelties, 333 NLRB 1312 (2001), where

the Board reversed the regional director's finding that a new contract was a bar to the filing of the petition.

In Madelaine Chocolate Novelties, the employer and the union were parties to a four-year collective-bargaining agreement. Prior to the third anniversary of that agreement, the parties entered into a new collective-bargaining agreement that merely adopted, for the first year, the terms and conditions of employment contained in the prior contract, and provided a re-opener for the negotiation of all economic terms and conditions of employment for the next three years of the contract.

The Board found that the new agreement did not satisfy the requirements set forth in Appalachian Shale Products, supra. Specifically, the Board noted that the new agreement left open for future negotiation all economic matters for the last three years of the four-year contract, and simply adopted, as its first year, the terms and conditions of employment of the fourth year of the prior contract. As noted by the Board, "the parties did not engage in substantive negotiations for any additions or modifications to the terms and conditions of employment for the year 2000 or for any subsequent years. The "new" agreement therefore was nothing more than an agreement to begin negotiations in the near future." Madelaine Chocolate Novelties, 333 NLRB at 1313.

I find the facts in the instant proceeding distinguishable from those relied on by the Board in Madelaine Chocolate Novelties. The record herein demonstrates that the Employer and the Union met at least four times in the approximately two-and-one-half months preceding the signing of the MOA, that the Union requested collective-bargaining negotiations in response to the Employer's proposed productivity plan, and that the Employer agreed to engage in collective-bargaining negotiations. The result of those negotiations was the MOA which, unlike the agreement in Madelaine Chocolate Novelties, is not merely an adoption of the prior contract

and a promise to engage in bargaining at some future date, but rather contains substantial changes to the terms and conditions of employment. Specifically, as a result of the execution of the MOA, employees are, inter alia, exempt from layoffs for six months; will enjoy improved health and life insurance benefits as of May 1, 2009, and will have access to dental and eyeglass insurance coverage. Thus, unlike the agreement in Madelaine Chocolates Novelties, the MOA contains substantial modifications to the terms and conditions of employment of the unit employees.

I do not find merit to the Petitioner's contention that the parties' agreement to re-open the contract upon the request of either party for the purpose of negotiating economic terms, including wages, and the lack of specificity set forth in the MOA regarding wage increases, renders the agreement invalid as a contract bar. In so finding, I note that the MOA definitively settles a number of issues between the parties. As noted by the Employer and the Union in their post-hearing briefs, an agreement may have bar quality, even where it does not settle every terms and condition of employment. See, e.g., Stur-Dee Health Products, 248 NLRB 1100 (1980)(the failure of a contract to delineate every possible provision does not render it ineffective as a contract bar).

I agree with the Union and the Employer that the re-opener provision in the MOA, which contemplates possible negotiation and arbitration of economic terms at some future date, does not render the contract fatally defective for contract-bar purposes. Where a contract otherwise sets forth numerous terms and conditions of employment but leaves open for future discussion certain economic terms, the Board has found that such contracts are a bar to the processing of a petition filed by a rival union. See Jackson Terrace Associates, 346 NLRB 180 (2004)(Board found a successor agreement to be a contract bar where the parties had reached agreement on everything except wage and pension issues, which they agreed to send to interest arbitration).

See also Stur-Dee Health Products, 248 NLRB at 1100, quoting Spartan Aircraft Company, 98 NLRB 73, 74-75 (1952), where the Board found that such contracts “chart with adequate precision the course of the bargaining relationship [so that] the parties can look to the actual terms and conditions of the contract for guidance in their day-to-day problems.” In Spartan Aircraft Company, the Board found a contract to be a bar where the parties agreed to a provision stating that the employer and union would “endeavor to agree upon the proper classification and hourly rate ranges as soon as possible.”

I find the facts of the instant case to be analogous to those in Cooper Tank and Welding Corp., 328 NLRB 759 (1999). In that case, the parties agreed to a wage provision that provided that employees would be paid at least 25 cents above the established minimum wage. The acting regional director found that the contract did not have bar quality because, inter alia, it did not set forth specific wage rates. The Board disagreed, and found as follows:

We do not agree with the Acting Regional Director’s finding that the contract’s failure to set forth specific wage rates is fatal to the contract’s being a bar. First, we note that in all other respects, the contract is complete. It includes provisions pertaining to, inter alia, union security, general conditions, picket lines, hours of work, Saturday and Sunday work, shop stewards and union visitation, seniority, grievance and arbitration procedures, holidays, vacations, better working conditions, discrimination against union members, work condition standards, discharges, strikes and lockouts, leave of absence, and health and welfare. That a contract of this dimension does not include a specific wage provision as such as, in this context, insufficient to render it null for bar purposes.

Id. at 759, citing Stur-Dee Health Products, supra; Spartan Aircraft Co., supra.

As in Cooper Tank, the parties in the instant case have reached definitive agreement on many significant terms and conditions of employment, including provisions regarding hours of work; probationary periods; seniority; discharge; the grievance-arbitration procedure; management rights; paid holidays; security fund; vacation; sick and personal leave; and leaves of

absences. Thus, I find the absence of a specific provision governing wage increases an insufficient basis to render the MOA inadequate for contract bar purposes.

Petitioner next contends that the MOA herein is similar to the memorandum of understanding at issue in Coca-Cola Enterprises, Inc., 352 NLRB No. 123 (August 14, 2008). In Coca-Cola, the Board found that a memorandum of understanding amending a long-term contract after the end of the third year was insufficient to serve as a bar to a petition because the parties did not intend the memorandum of understanding to be a new agreement; the memorandum of understanding had no readily discernable effective dates; and it did not chart with adequate precision the collective-bargaining relationship.

The Petitioner argues that the MOA herein is similarly defective for purposes of barring the processing of the instant petition. I disagree and find the MOA herein to be substantially different. Initially, I note that, unlike the memorandum of understanding in Coca-Cola, the MOA on its face unambiguously recites the intent of the parties to enter into a new collective-bargaining agreement, to be effective from February 27, 2009 through February 26, 2012.¹³

I next note that the MOA herein specifically recites the effective dates of the new agreement, including the termination date. Thus, any party can readily discern from the face of the MOA the appropriate time for the filing of a petition. South Mountain Healthcare & Rehabilitation Center, 344 NLRB 375 (2005).

¹³ The Petitioner relies on certain testimonial evidence in the record in support of its position that the parties did not intend to enter into a new collective-bargaining agreement. It is well-established Board law that a party may not use parole evidence of intent to vary the terms of an otherwise unambiguous provision in a collective-bargaining agreement. See, e.g., Don Lee Distributor, Inc., 322 NLRB 470, 484 (1996); Adobe Walls, 305 NLRB 25 (1991); NDK Corp., 278 NLRB 1035 (1986). Even were I to consider the extrinsic evidence in the record regarding the intention of the parties to engage in collective-bargaining negotiations, such evidence demonstrates that bargaining arose as a result of the Employer's December 2008 announcement that it intended to implement productivity changes, that the Union demanded bargaining as a result of these proposed changes and complaints by the employees, and that the Employer agreed to engage in negotiations for a new collective-bargaining agreement. Thus, the evidence in the record only bolsters the unambiguous contractual provision in the MOA.

Finally, Petitioner argues that the MOA does not stabilize the bargaining relationship because, as in Coca-Cola, it addresses only a few limited items and is thus insufficient to chart the course of the collective-bargaining relationship within the meaning of Appalachian Shale Products Co., 121 NLRB 1160 (1958). Central to this issue in Coca-Cola was the Board's determination that the language in the memorandum of understanding, wherein the parties agreed that their rights and obligations under the existing collective-bargaining agreement remained in effect unless explicitly waived, was a reference to the prior contract, but did not serve to incorporate that contract into the memorandum of understanding, or to expressly reaffirm the intent of the parties to be bound to the terms of that collective-bargaining agreement.

On the contrary, in the instant case, the parties agreed in the MOA that the provisions of the 2004 agreement remain in effect unless modified by the MOA. In The Carborundum Company, 78 NLRB 91 (1948), the Board found that a memorandum of agreement, in which the parties agreed to continue the terms and conditions of the existing contract with certain stated changes and modifications, incorporated by reference the provisions of the contract and constituted a "sufficient and comprehensive written memorandum of the understanding between the parties to stabilize bargain relations for employees concerned." *Id.* at 93, f. 3. See also Shen Valley Meat Packers, Inc., 261 NLRB 958 (1982) (Board found that an amendment to an agreement stating that it "is in effect through the remainder of the agreement" expressly affirmed the long-term agreement and indicated a clear intent on the part of the contracting parties to be bound for a specific period); Southwestern Portland Cement Co., 126 NLRB 931, 933 (1960)(a new agreement which expressly reaffirms the long-term agreement and indicates a clear intent on the part of the contracting parties to be bound for a specific period renders the agreement effective as a contract bar).

The MOA herein clearly expresses the intent of the parties to be bound by the terms and conditions of employment set forth in the 2004 agreement not specifically modified therein.

Petitioner further argues that public policy dictates that employees periodically have the opportunity to challenge the incumbent union's status as their collective-bargaining representative. As noted by the Petitioner, the Board "has discretion to apply a contract bar or waive its application consistent with the facts of a given case, guided overall by our interest in stability and fairness in collective-bargaining agreements." Direct Press Modern Litho, Inc., 328 NLRB 860, 861 (1999).

I find, based on the evidence adduced in the record, the public policy is best served by dismissal of the petition herein. In this regard, I note that there was no contract bar in place for employees in the petitioned-for unit from December 20, 2007 through February 27, 2009, the date that the Employer and the Union signed the MOA.¹⁴ Although Petitioner argues that dismissal of the petition will rob employees of the right to challenge the Union's representative status, the record demonstrates that unit employees had ample opportunity to do so prior to the execution of the MOA. Rather, no petition was filed and employees are currently the beneficiaries of a newly-negotiated agreement bargained on their behalf by their chosen collective-bargaining representative. As noted by the Board in Pacific Coast Association of Pulp & Paper Manufacturers, 121 NLR 990, 994 (1958), the premise of the contract bar doctrine is that the postponement of employees' opportunity to select their collective-bargaining relationship is justified only where "encouraging and promoting industrial stability is effectuated

¹⁴ Moreover, a petition for an election could have been filed during the 30-day window period, which began 90 days prior to the expiration of the 2004 agreement. Canal Carting, Inc., 339 NLRB 969 (2003).

thereby.” I find that the public interest is best served by promoting the industrial stability currently afforded to the bargaining unit employees by the MOA.¹⁵

Ratification

Finally, the Petitioner argues in its post-hearing brief that the MOA is not a valid contract bar to the instant petition because it was not ratified by the membership. Specifically, the Petitioner argues that because the 2004 agreement contained what it asserts is a ratification provision which was adopted into the MOA, that ratification was a condition precedent to the validity of the MOA.

The Petitioner correctly states the proposition that “[w]here ratification is a condition precedent to contractual validity by express contractual provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar.” Appalachian Shale Products Co., 121 NLRB 1160 (1958). I find that ratification was not a condition precedent to the validity of the MOA in the instant case.

In finding no ratification was required, I note that neither the MOA nor the Union’s constitution and by-laws makes ratification of collective-bargaining agreements by the membership a condition precedent to contract formation. Thus, there is was no express provision or requirement that the MOA be ratified by the membership.

To the extent that Petitioner argues that ratification was required based on the ratification language in the 2004 agreement, I find that the 2004 agreement did not make ratification a

¹⁵ I give no consideration herein to the Petitioner’s reliance on the premature extension doctrine. It is well-established Board law that the premature extension doctrine only applies where the agreement alleged to be a bar was formed prior to open period during the 60 days preceding the expiration of a contract, or preceding the third anniversary of a contract of more than three years duration. In the instant case, the petition was filed approximately 17 months after the open period. M.C.P. Foods, 311 NLRB 1159 (1993).

condition precedent to the formation of the MOA. In this regard, I note the absence of any language in the 2004 collective-bargaining agreement explicitly stating that ratification of the agreement was required. Rather, Article 14 of the 2004 collective-bargaining agreement merely recites the terms of a ratification bonus if employees ratified “this Agreement.” I find that this language is not an “express provision for prior ratification” as articulated by the Board in Appalachian Shale Products, supra.

In Childers Products Company, 276 NLRB 709 (1985), the Board adopted the finding of the administrative law judge that ratification was not a condition precedent to contract formation, even where the collective-bargaining agreement stated that the contract was subject to ratification. “In this proceeding, though the contract stated that it was “subject to ratification,” there was no requirement that employees of the Employer ratify the contract. The condition precedent of “ratification” means ratification as defined by the Union in its internal procedures.” *Id.* at 711.

In the instant case, as in Childers Products, the ratification language in the 2004 agreement does not require ratification as a condition precedent to the formation of the agreement. Rather, Article 14 of the agreement merely recites a ratification bonus to be paid to employees if the agreement was ratified.

Based on the above, I conclude that the MOA is a complete agreement between the parties as contemplated by the Board in Appalachian Shale Products Co. and its progeny. Accordingly, I conclude that the MOA, executed prior to the filing of the instant petition, constitutes a contract bar for purposes of the petition filed herein.

CONCLUSION

Based on my finding that the MOA constitutes a contract bar, no question concerning representation among employees covered by the petition exists, and I shall dismiss the petition on that basis.

ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington, DC by 5 p.m. EDT, **April 30, 2009**. The request may be filed electronically through the Agency's web site, www.nlrb.gov,¹⁶ but may not be filed by facsimile.

DATED at Buffalo, New York this **16th day of April, 2009**.

/s/ Rhonda P. Ley

RHONDA P. LEY, Regional Director
National Labor Relations Board, Region 3
Niagara Center Building – Suite 630
130 S. Elmwood Avenue
Buffalo, New York 14202

¹⁶ To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the "File Documents" button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, check the box next to the statement indicating that the user has read and accepts the E-Filing terms and click the "Accept" button. Then complete the filing form with information such as the case name and number, attach the document containing the request for review, and click the Submit Form button. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's web site, www.nlrb.gov.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MURRAY BRESKY CONSULTANTS, LTD.
Employer

and

Case 3-RC-11896

UNITED FOOD & COMMERCIAL
WORKERS UNION, LOCAL 342
Petitioner

and

LOCAL 726, INTERNATIONAL
UNION OF JOURNEYMEN &
ALLIED TRADES
Union

ORDER

Petitioner's Request for Review of the Regional Director's Decision and Order is denied as it raises no substantial issues warranting review.¹

WILMA B. LIEBMAN, CHAIRMAN

PETER C. SCHAUMBER, MEMBER

Dated, Washington, D.C., July 1, 2009.

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed __ U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).